JASA KERAMAT SDN BHD

v.

MONATECH (MALAYSIA) SDN BHD

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[ORIGINATING SUMMONS NO: 24-509-1998]
2 MAY 2003

CIVIL PROCEDURE: *Consent order - Variation - Variation of interim consent order - Principles applicable - Whether interim consent award provided for variation - Whether change of solicitors entitled party to variation - Whether defendant would suffer prejudice if present status quo maintained - Whether safe to allow variation*

WORDS & PHRASES: *"until further order of the court" - Interim consent order - Whether provided for variation of interim consent order*

This was an application by the defendant to transfer a sum of RM575,000, being the contractual retention sum, from the existing stake holders' account in the joint names of Messrs. Presgrave & Matthews and Messrs. Annamalai & Co to a new stakeholders' account in the joint names of Messrs. Presgrave & Matthews and Messrs. Loo, Siva & Param. The defendant's application was grounded on its contention that since the interim consent order recorded by the court, it had changed its solicitors from Messrs. Annamalai & Co to Messrs Loo, Siva & Param, and as a result thereof, it was unable to instruct Messrs Annamalai & Co.

The plaintiff objected to the defendant's application on the ground that this court was *functus officio* unless the plaintiff agreed to the defendant's proposed variation as the interim consent order had already been perfected. The defendant, however, contended that in view of the defendant's change of solicitors, it was unreasonable for the contractual retention sum to continue to be held in the name of the defendant's previous solicitors since the defendant could no longer give instructions to them. Furthermore, there was a provision in the interim consent order itself for this court, unless there was misconduct shown, to vary the consent order by virtue of the words "until further order of the court".

Held:

[1] An interim consent order which expressly provided that the order should be applicable "until further order of the court" did not confer any right on any one of the parties to ask the court to vary the order. (p 587 e)

[2] The fact *per se* that a party had changed his solicitors was insufficient to *ipso facto* entitle the party to such a variation; otherwise a party could always frustrate an interim consent order by merely changing his solicitors. (p 588 h)

[3] By using the phrase "until further order of the court" in the interim consent order, the parties must have intended to await the outcome of that event whereupon the court would make a further order depending on the outcome of that event. Therefore, since the dispute between the parties had yet to be resolved, there could be no prejudice to the defendant if the present *status quo* was maintained. (p 589 c)

[4] In view of the historical background of the case which had cast serious doubts on the *bona fides* on the part of the defendant in making this application, it would not be safe to allow a variation of the interim consent order at this point of time. (p 589 d)

[Application dismissed.]

Case(s) referred to:
Ganapathy Chettiar v. Lum Kum Chun & Ors [1981] 2 MLJ 145 ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***
Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***
Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***
Tio Chee Hing v. Tractors Malaysia Bhd [1973] 1 MLJ 66 FC ***(refd)***
Tong Lee Hwa & Anor v. Chin Ah Kwi [1971] 2 MLJ 75 FC ***(refd)***

For the plaintiff - A Suppiah; M/s Pregrave & Matthews
For the defendant - En Parameswaran; M/s Loo Siva & Param

Reported by Suresh Nathan

JUDGMENT

Su Geok Yiam JC:
This is an application *vide* a summons-in-chambers (encl. (70)) by the defendant to transfer a sum of RM575,00 being the contractual retention sum from the existing stakeholders' account in the joint names of Messrs. Presgrave & Matthews and Messrs. Annamalai & Co to a new stakeholders' account in the joint names of Messrs. Presgrave & Matthews and Messrs. Loo, Siva & Param.

It is supported by the affidavit of Parameswaran a/1 Subramaniam, the current solicitor of the defendant, who affirmed the affidavit on 2 June 2002 on behalf of the defendant, (encl. (69)).

It sets out the grounds for the application. It states that the defendant has since the interim consent order recorded by the court on 20 July 1998 (hereinafter referred to as "the interim consent order") changed its solicitors from Messrs. Annamalai & Co to Messrs Loo, Siva & Param.

As a result thereof the defendant is unable to instruct Messrs. Annamalai & Co. Hence the defendant's application was filed.

In the plaintiff's affidavit-in-reply affirmed by its managing director, Cheah Chin Huat, on 21 October 2002 (encl. (73)), the plaintiff has objected to the defendant's application on the ground that this court is *functus officio* unless the plaintiff agrees to the defendant's proposed variation as the interim consent order has already been perfected. Furthermore, the defendant will not suffer any prejudice if the *status quo* is maintained.

Mr. A. Suppiah, learned counsel for the plaintiff, has cited two cases in support of his objection, namely, *Ganapathy Chettiar v. Lum Kum Chun & Ors.* [1981] 2 MLJ 145 and *Hock Hua Bank Bhd v. Sahari b. Murid* [1981] 1 MLJ 143.

He further argues that as the interim consent order contains no provision for the variation of the name of the trust account in the event that there is a change of solicitors, the *status quo* should be maintained.

He referred the court to the decision of the Court of Appeal in the case of *Jasa Keramat Sdn. Bhd & Anor v. Monatech (M) Sdn. Bhd.* [1999] 4 CLJ 533 and the decision of the Federal Court in the case of *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401 in order to draw the attention of the court to the historical background of the case. In view of the historical background of the case, the plaintiff feels that it is not safe for the court to grant the defendant's application.

In response, Mr. Parameswaran, learned counsel for the defendant, contended that in view of the defendant's change of solicitors it is unreasonable for the contractual retention sum to continue to be held in the name of the defendant's previous solicitors since the defendant can no longer give instructions to them. Furthermore, there is provision in the interim consent order itself for this court, unless there is misconduct shown, to vary the consent order by virtue of the words "until further order of the court". He added that the current solicitors will give the same undertaking.

On 3 March 2003, the court dismissed encl. (70) with costs ("the said order").

The reasons why the court made the said order are as follows:

First the court has to consider the following issues which have arisen as a result of this application:

(1) whether an interim consent order which expressly provides that the order shall be applicable "until further order of the court" can be varied;

(2) whether the fact of a change *per se* in a party's solicitors would *ipso facto* entitle the party to such a variation;

(3) whether in the instant case the defendant would suffer any prejudice if the defendant's application is disallowed; and

(4) whether in view of the historical background of the instant case it would not be safe for the court to allow such a variation.

Issue (1)

In my judgment an interim consent order which expressly provides that the order shall be applicable "until further order of the court" does not confer any right on any one of the parties to ask the court to vary the order. However it can be varied by the consent of both parties (see the cases of *Ganapathy Chettiar v. Lum Kum Chun & Ors.* [1981] 2 MLJ 145 and *Hock Hua Bank Bhd v. Sahari b. Murid* [1981] 1 MLJ 143). It can also be varied if the party seeking to vary it can show that there has been a clerical error or an error arising from an accidental slip or omission in the order or the order as drawn up does not correctly state what the court actually decided and intended to decide (see the case of *Tio Chee King v. Tractors Malaysia Bhd* [1973] 1 MLJ 66, FC).

The Federal Court in *Tong Lee Hwa & Anor v. Chin Ah Kwi* [1971] 2 MLJ 75 held that the words "liberty to apply" in an order *prima facie* mean that when the order was drawn up its working out might involve matters on which it is necessary to obtain a decision of the court; they do not confer any right to ask the court to vary the order.

In that case the respondent, relying on the words "liberty to apply" in the consent order had applied to the High Court to vary the date of completion of purchase of shares in a settlement agreement arising out of a probate action from "29 February 1970" to "such date as should seem fit and proper to the court". The appellant objected but the learned High Court judge allowed the application and varied the date to "28 February 1970" and extended the time

for completion to 21 April 1970". The appellant appealed. The Federal Court in allowing the appeal distinguished the expression "liberty to apply" when used in maintenance orders and the words "liberty to apply" in the order before the court and held that the words mean no more than that the parties were at liberty to go back to the court for the purpose of working out the terms of settlement, such as approving the appointment of arbitrators and other experts for the purpose of para. 5 of the schedule. The Federal Court found that there was clearly an error in the insertion of the date 29 February 1970 in para. 4 as the last date for completion because February of that year had only 28 days. It was thus "a clerical error arising from accidental slip and one which could easily have been corrected under r. 11 O. 28 of the Rules of the Supreme Court".

On the issue whether a consent judgment would operate as an estoppel, the learned judge in *Tio Chee Hing v. Tractors Malaysia Bhd* [1973] 1 MLJ 66 had this to say at pp. 67 and 68:

> Now, although as a general rule a consent judgment would operate as an estoppel, yet there are clear exceptions to this rule. Thus, it was held in *Attorney-General v. Tomline* that after a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. In *Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd.* Lopes LJ said:
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> > The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside.
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> In *Wilding v. Sanderson* the Court of Appeal held, inter alia, that an order made in an action by consent and based upon, and intended to carry out, an agreement come to between the parties, can be set aside on any ground on which an agreement in the terms of the order could be set aside, and one of such grounds is mistake. Pretheroe J followed these last two cases in *Au Yuan Chee v. Lim Leong Thiam & Ors* to hold that where it is established that a judgment has been obtained fraudulently or by reason of mutual mistake of the parties regarding a material fact, the court has power to set aside the judgment.

Issue (2)

In my judgment the fact *per se* that a party has changed his solicitors is insufficient to *ipso facto* entitle the party to such a variation otherwise a party can always frustrate an interim consent order by merely changing his solicitors.

Issue(3)

In my judgment, as the defendant has not shown that it will suffer any hardship if the *status quo* is maintained the court is satisfied that the defendant would not suffer any prejudice if the court were to disallow its application. The reason is because the interim consent order relates only to the contractual retention sum which is being held pending the outcome of the arbitration proceedings or the court proceedings, whichever is applicable, which event has not taken place yet. By using the phrase "until further order of court" in the interim consent order the parties must have intended for the parties to await the outcome of that event whereupon the court would make a further order depending on the outcome of that event. Therefore, as the disputes between the parties have yet to be resolved there could be no prejudice to the defendant if the present *status quo* is maintained.

Issue (4)

In my judgment in view of the historical background of the case which has cast serious doubts on the *bona fides* on the part of the defendant in making this application it would not be safe for the court to allow a variation of the interim consent order at this point of time.

The historical background of the case is as follows:

The plaintiff entered into an agreement with the defendant, a housing developer. The agreement was in the form prescribed by the Architects Association of Malaysia. It contained an arbitration clause. When disputes subsequently arose over certain payments which the defendant claimed was due to it from the plaintiff, the parties referred the disputes to an arbitrator. On 1 June 1998, while the arbitration was ongoing, the plaintiff took out an originating summons before the High Court at Penang (hereinafter referred to as "the first action") and obtained an *ex parte* Mareva injunction freezing the contractual retention sum in the hands of the defendant. At the hearing of the 1st action on 2 July 1998, counsel for both sides appeared before the learned judge and recorded the interim consent order. The terms of the interim consent order were that the defendant would deposit the contractual retention sum of RM575,000 into a joint account in the names of the parties' respective solicitors and the sum would be so held pending the resolution of the parties' disputes either through arbitration or litigation.

Nevertheless, on 7 July 1998, the defendant took out an originating summons in the High Court at Penang (hereinafter referred to as "the second action") in which the defendant obtained an *ex parte* injunction restraining the arbitrator from proceeding with the arbitration.

Furthermore, on 27 August 1998, the defendant filed a writ and statement of claim in the High Court at Shah Alam (hereinafter referred to as "the third action") against the plaintiff and its managing director. The defendant further applied for and obtained an *ex parte* injunction restraining all proceedings in the 1st and 2nd actions and an order directing, *inter alia*, that the contractual retention sum held in the joint account pursuant to the interim consent order be paid out to the defendant.

The plaintiff and its managing director immediately took out two summonses to strike out the third action as an abuse of process. Although they failed in the High Court, they succeeded in their appeal to the Court of Appeal. On 3 May 1999, the Court of Appeal struck out the third action. The Court of Appeal held, *inter alia*, that on the facts, the defendant had plainly abused the process of court. The reasons were that there was no good reason for the defendant to have approached the High Court at Shah Alam by way of the third action. By doing so and by obtaining the *ex parte* order in the third action whereby the contractual retention sum was to be released to it, the defendant was actually nullifying the interim consent order in the first action since by the interim consent order both parties had expressly agreed that the contractual retention sum shall be placed in a joint account pending the resolution of the parties' disputes either through arbitration or litigation.

That was not the end of the matter. It is to be emphasised that in respect of the first action, the learned judge had ordered the *ex parte* application by the plaintiff filed on 1 June 1998 for Mareva injunction to be heard *inter partes*. Initially the application was fixed for hearing on 30 June 1998. However it was adjourned a number of times until 14 August 1998 when the defendant through its solicitors pledged eight units of properties as securities and the matter was further adjourned to 29 August 1998. The plaintiff did not accept the pledge on the ground that it was insufficient.

However, on 24 August 1999, when the plaintiff finally succeeded in obtaining a Mareva injunction order against the defendant to, *inter alia*, restrain the defendant from disposing off its assets, all the units had been sold by the defendant in May 1999. Unfortunately, it was only on 7 November 1999 that the defendant informed the plaintiff that there were no units left. Thus the plaintiff was left with only a paper order which was of no value whatsoever.

This led to the plaintiff taking contempt proceedings against the defendant's general manager, Khor Kok Thye and the defendant's two directors, Khor Kok Boon and Mohd. Dzolkefli bin Jaafar Sedik. The learned judge in dismissing the plaintiff's application found on the facts that the defendant, its general manager and its two director had not committed contempt of court.

The plaintiff successfully appealed to the Court of Appeal which found that on the facts there was contempt of court. It set aside the order of the learned judge and remitted the case to the High Court for sentencing.

Upon the application of the defendant, its general manager and its two directors (hereinafter referred to as "the contemnors") the Federal Court granted the defendant and the contemnors leave to appeal in respect of the following question:

> Whether a defendant against whom an application for a Mareva injunction is pending in court, is free to dispose off his assets until the moment, when the Mareva injunction is granted against him.

Subsequently, the Federal Court added the following consequential question framed as question (2):

> if the answer to the said question is in the affirmative, then, can the appellant/ defendant in this appeal be found to have been guilty of being in contempt of court by interfering with the due administration of justice for his conduct in disposing off his assets, in all the circumstances of this case?

The Federal Court decided the question in the affirmative, subject to the qualification that there is no wanton destruction of the subject matter with the intention of impeding a pending proceeding for Mareva injunction. The Federal Court also agreed with the finding of the Court of Appeal that on the particular facts and circumstances of the case, it was the clear intention of the defendant to interfere with the due administration of justice or in the course of justice by dissipating all the assets of the defendant in questionable dealings to frustrate the Mareva injunction proceedings then pending and any judgment that might be obtained later by the plaintiff in the arbitration.

In arriving at its decision on the second question Haidar FCJ in delivering the judgment of the Federal Court said as follows at pp. 414-415:

> We do not propose to set out in detail the disposal of the assets of the defendant as they are sufficiently set out by the Court of Appeal. Suffice for us to say that the speed with which the assets were disposed off and for that matter to the parties that are closely related to the persons in control of the defendant are not seriously disputed. It was not seriously challenged that the sales were made not at arms length. In some of the sales, the transfers were executed even without the full payments! Surprisingly, at the time when the Mareva injunction was granted, the defendant chose to remain silent and let the order be made knowing fully well that it would be a futile order and it would come to naught. The reason given for the silence was that the counsel had no knowledge of the disposal of all the assets by the defendant.

Is that a good reason? We must say that it is the duty of counsel to get instructions from the defendant on the disposal of its assets so that counsel can then inform the court accordingly in the event the court is minded to grant a Mareva injunction order. It was only on 17 November 1999 that the defendant informed the plaintiff that there were no units left that led to the plaintiff subsequently taking steps towards contempt of court proceeding against the contemnors.

The Federal Court, accordingly, dismissed the defendant's appeal with costs.

In the premises, this court dismissed the defendant's application with costs.